REME COURT, U. S.

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FILED
FEB 14 1969
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IN THE

Supreme Court of the United States

October Term, 1968

No. 758

NATIONAL LABOR RELATIONS BOARD,

against

JOHN LANGENBACHER CO., INC.,

Petitioner.

PETITIONER'S REQUEST FOR REHEARING

MILLER AND BUSH,

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Petitioner requests a rehearing of its application for a writ of certiorari. The basis for this request is that petitioner believes that a serious threat exists to the rights of an employer to operate its business under the decisions of the National Labor Relations Board and the Circuit Courts of Appeals and the decision of this Court.

The facts will be repeated here even though repetitious. Petitioner was found to have violated Sections 8 (a) (1) of the Labor Management Relations Act, as amended, by having failed to rehire three employees who were laid off with others because of economic conditions because these three employees had prior to their lay-off participated in concerted activity. The concerted activity consisted of the following: Petitioner's president requested approximately six of the employees of its finishing department to come to his office and told them to work a staggered starting time so that half of the employees would come to work at 8:00 A. M. and the other half at 12:30 Noon. One of the employees left before the meeting finished. The other

employees refused to work as requested, unless they were paid premium pay. There were a total of eight employees in the finishing department. These employees were covered by an existing collective bargaining agreement with District Council No. 9 of the Painters Union. The collective bargaining agreement did not restrict petitioner's right to fix starting time, nor did it provide for premium pay except in the case of more than eight hours of work in a day or forty hours of work in a week, neither of which was involved. It was necessary to stagger employees' starting times because the area occupied by the finishing department was being used as a temporary store room caused by a delay in being able to deliver finished material and it was impossible for all the employees to work there efficiently at the same time. No disciplinary action was taken at the time against the employees who refused to work the staggered starting times. About two months later, the employment of approximately six of the employees of the finishing department was terminated because of lack of work. When petitioner got busy again three of these employees were not recalled to work. The Board found, and for the sake of argument petitioner agrees, that these three employees were not recalled because two months before they had refused to work staggered starting times unless they received premium pay.

No charge has ever been made that any anti-union *animus* provoked the petitioner in this case. In *Auto Workers* v. *Wisconsin Board,* 336 U. S. 245, 255-258, this Court held that the right of employees to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection guaranteed by Section 7 (a) of the National Labor Relations Act has not "irrevocably labeled all concerted activities protected" (p. 257). In this case the Court found that repetitious

work stoppages of short duration did not constitute protected activity.

In *Honolulu Rapid Transit Company Limited*, 110 N. L. R. B. 1806, the employees refused to work weekends but continued to work during the week. In holding this was not protected activity, the Board said "Establishment of work schedules is a responsibility (prerogative) of the employer which may of course, be the subject of bargaining. Employees may not, however, simultaneously accept and reject them, and thereby in effect establish and impose upon the employer their own chosen conditions of employment" (pp. 1809-1810). Both the Board in the *Honolulu Transit* case, *supra*, and this Court in *Auto Workers* v. *Wisconsin Board*, *supra*, cited with approval, *C. Q. Conn. Ltd.* v. *N. L. R. B.*, 108 Fed. 390 (CA 7), where employees refused to work overtime.

In *John S. Swift Company, Inc.*, 124 N. L. R. B. 394, the employees, to implement their demand that the employer cover them under the Union's health and welfare plan, refused to work over-time. In holding this action not protected concerted activity the Board said (p. 397):

> "The employees refusal to work over-time on March 11 constituted an attempt to work on terms prescribed solely by themselves. The Board and the Courts have squarely held that such refusal to work provides the employer with valid ground for discharge."

Under the decisions of this Court and the Board the employees in this case were seeking to impose upon petitioner their own terms of employment, and petitioner could have discharged any employee who refused to work a staggered starting schedule. The refusal to work a staggered starting schedule was not protected concerted

activity. For reasons which to petitioner were sufficient, it did not choose to exercise its right to discharge at that time. It is illogical to hold that concerted activity which is unprotected at the time it occurred becomes protected by the mere passage of time. The finding of the Board that the refusal to work staggered starting times constituted protected concerted activity under Section 7 of the Act is contrary to the decisions of the Board, to the decision of the Circuit Courts of Appeals and to the decision of this Court.

Petitioner's request for certiorari should be granted.

Respectfully submitted,

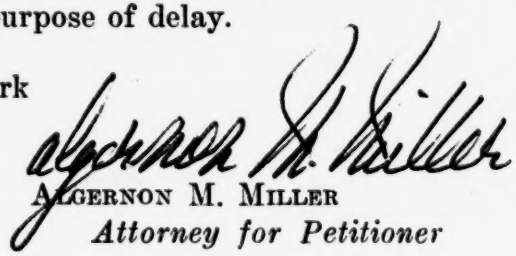
MILLER AND BUSH,

By: ALGERNON M. MILLER,
Attorneys for Petitioner.

February 13, 1969.

I CERTIFY that this application for rehearing is made in good faith and not for the purpose of delay.

Dated: New York, New York
February 13, 1969.



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